

ISSUE DATE: August 1, 1997

DOCKET NO. E-002/PA-95-500

ORDER ACCEPTING REPORT AND COMPLIANCE FILING AND DENYING MOTION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey
Joel Jacobs
Marshall Johnson
Don Storm

Chair
Commissioner
Commissioner
Commissioner

In the Matter of Northern States Power
Company's Petition for Approval to Merge
with Wisconsin Energy Corporation

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PROCEDURAL HISTORY

On July 23, 1996, the Commission requested the Minnesota Attorney General to conduct an investigation of an alleged *ex parte* communication in this matter. The communication in question was alleged to have taken place between Commission Chair Joel Jacobs and Merle Anderson, at the time Director of State and Metropolitan Governmental Affairs for Northern States Power Company (NSP).

On September 4, 1996, the Commission received the Report of the Attorney General's Office.

On September 5, 1996, the Commission issued to all parties in this docket a Notice of Comment Period and Commission Meeting. Along with the Notice, the Commission included a copy of the Attorney General's Report and requested the parties' comments.

Initial comments were filed by Otter Tail Power Company (OTP), Minnesota Power (MP), the Environmental Coalition¹ and the Citizens' Utility Board (jointly) (EC/CUB), the Energy CENTS Coalition, the Residential and Small Business Utilities Division and the Antitrust Division of the Office of the Attorney General (OAG), the Department of Public Service (the Department), and NSP. Reply comments were filed by EC/CUB, OAG, and the Department.

¹ The Environmental Coalition is composed of the Izaak Walton League of America, Minnesotans for an Energy Efficient Economy, and the Environmental Law and Policy Center of the Midwest.

On October 28, 1996, the Commission issued its ORDER FINDING NO PROHIBITED *EX PARTE* CONTACT in this matter. Based on its analysis, the Commission concluded that the exchange in question fell outside the kind of communication the Commission's *ex parte* rules seek to prevent and, hence, did not violate those rules. Order at page 6.

On November 19 or 18, 1996², the Environmental Coalition, Energy CENTS Coalition and Citizens' Utility Board (EC/CUB) filed with the ALJ a motion requesting that the ALJ 1) stay the evidentiary hearing in this matter scheduled to begin before the ALJ on November 20, 1996 and 2) certify to the Commission EC/CUB's Petition for Reconsideration and Rehearing of the ORDER FINDING NO PROHIBITED *EX PARTE* CONTACT. Along with its motion to the ALJ, the EC/CUB included a copy of its petition to the Commission for reconsideration.

On November 19, 1996, the EC/CUB filed with the Commission a Petition for Reconsideration and Rehearing of the ORDER FINDING NO PROHIBITED *EX PARTE* CONTACT and a copy of the motion it had filed with the ALJ requesting that the ALJ 1) stay the evidentiary hearing in this matter scheduled to begin before the ALJ on November 20, 1996 and 2) certify to the Commission EC/CUB's petition for reconsideration.

On November 20, 1996, following oral argument by the parties, the ALJ denied the motion for stay of proceedings, but granted the request for certification of EC/CUB's Petition for Reconsideration and Rehearing. The ALJ issued a formal Order to that effect on December 3, 1996.

On November 27, 1996, Northern States Power Company (NSP) filed documentation responding to a directive in the Commission's October 28, 1996 Order explaining how the Company's policies and programs apply to registered lobbyists and independent consultants.

On December 4, 1996, the Commission issued a Notice of Reply Comment Period and Commission Meeting. Parties were given until December 13, 1996 to submit replies to the EC/CUB petition.

On December 13, 1996, Northern States Power Company (NSP) filed its Reply Comments and

² The date of the filing of this petition and motion with the Commission (November 19, 1996) is not disputed by any party. The date of the filing with the ALJ is disputed by the Environmental Coalition. In his order referring the motion to the Commission, the ALJ stated that the petition/motion was filed November 19, 1996. The ALJ made a formal finding on this point (#16) in his Findings of Fact and Recommendation filed with the Commission on February 7, 1997. The Environmental Coalition filed an exception to that finding on March 6, 1997, asserting that the petition/motion was filed on November 18, 1996. Because the EC/CUB's petition for reconsideration has been denied by operation of law pursuant to Minn. Stat. § 216B.27, subd. 4 (1996) regardless of when the petition was filed, the question of when the petition was filed with the ALJ is not relevant to the issues at hand in this Order and will not be addressed at this time.

the Minnesota Department of Public Service (the Department) and the Residential and Small Business Utilities and Antitrust Divisions of the Office of the Attorney General (OAG) filed their comments.

On December 20, 1996, the Commission met to consider this matter. The Commission adopted motions to reconsider its October 28, 1996 Order in this matter, finding *ex parte* communication and intentional violation of the *ex parte* rules that warranted the mandatory recusal of Commissioners Jacobs and Johnson and the censure of NSP. In addition, the Commission voted to reaffirm the scope of this proceeding and to accept the compliance filing required of NSP in the Commission's October 28, 1996 Order.

On January 21, 1997, the Commission met to consider this matter further. The Commission voted to reconsider its December 20, 1996 motion to reconsider the Commission's October 28, 1996 Order in this matter and to deny the petition filed by EC/CUB as untimely.

On March 27, 1997, the Environmental Coalition filed an affidavit in support of its claim that its Petition for Reconsideration and Rehearing of [the Commission's October 28, 1996] ORDER FINDING NO PROHIBITED *EX PARTE* COMMUNICATION was timely filed with the ALJ, i.e. on November 18, 1996. NSP filed an objection to this affidavit on April 15, 1997.

On April 10, 1997, the Commission received a written report from Special Assistant Attorney General and former Minnesota Supreme Court Chief Justice John Simonett (Special Counsel) on whether there were violations of Commission rules in this proceeding and, if so, what the Commission should do about it.

On May 15, 1997, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

A. Report of the Commission's Special Counsel

Principal findings in the Report of the Special Counsel were as follows:

1. As to the *ex parte* rule, the evidence of its violation is tenuous; at best, reasonable minds can differ.
2. To the extent the remarks between Commissioner Jacobs and Merle Anderson might be construed as an improper *ex parte* communication, they appear a rather technical and innocuous infraction of the *ex parte* rule.
3. The attendance of Commissioners Jacobs and Johnson at the May 15, 1996 luncheon gave the appearance of impropriety in violation of Minn. Rules, Part

7845.0400, subp. 2.

4. The Commission's December 20, 1996 action regarding the October 28, 1996 Order is in abeyance and re-opened by the Commission's January 21, 1997 vote to reconsider its votes of December 20, 1996. Until reconsideration takes place, the Order of October 28, 1996, which has never been rescinded, stands.
5. Although there is no objective basis for questioning their fairness and impartiality, Commissioners Jacobs and Johnson have recused voluntarily in order to remove any concerns about the Commission's ability to deal with the merger fairly and impartially.

In sum, the Special Counsel noted that by adopting his report the Commission would be

- electing not to have a further hearing on the so-called ex parte matter and to leave the status of this matter in the procedural stance it now has;
- recognizing and approving the voluntary recusal of Commissioners Jacobs and Johnson from the merger proceedings for the duration of these proceedings; and
- finding that the parties to the merger proceedings and the proceedings themselves have not been prejudiced.

The Commission finds that the opinions, observations, and recommendations of the Special Counsel in this matter are appropriate and will, therefore, accept his report as the basis for resolving this matter. In so doing, the Commission understands that it is accepting and adopting as its own the views expressed by the Special Counsel with respect to several basic points as clarified in the report itself:

1. There is no need for a further hearing on the so-called ex parte matter.
2. The status quo of this matter remains unchanged, i.e. the October 28, 1997 Order remains the Commission's decision with respect to all issues addressed in that Order.
3. The voluntary recusal of Commissioners Jacobs and Johnson from the merger proceedings for the duration of these proceedings is accepted and approved as an appropriate way to remove any concerns about the Commission's ability to deal with the merger fairly and impartially.
4. It is clear from the record in this case that the parties to the merger proceedings and the proceedings itself have not been prejudiced.

B. Appearance of Impropriety

The Special Counsel advised and the Commission agrees that there is no objective basis for questioning the fairness and impartiality of Commissioners Jacobs and Johnson. Nevertheless and despite extenuating circumstances³, the Commissioners' attendance at the May 15, 1996 luncheon with three NSP personnel involved with the pending merger proceedings gave the appearance of impropriety in violation of Minn. Rules, Part 7845.0400, subp. 2 which states:

Commissioners and employees shall avoid any action that might result in...the appearance of impropriety.

When the discussion could be viewed as relating, however briefly and tangentially, to a pending matter involving the Commission's quasi-judicial function, circumspection is required in order to avoid an appearance of impropriety. See *Matter of Minnesota Public Utilities Commission*, 417 N.W.2d 274, 282-3 (Minn. App. 1987).

C. Denial of the Environmental Coalition's Petition for Reconsideration

Minn. Stat. § 216B.27, subd. 4 states:

Any application for a rehearing not granted within 60 days from the date of filing thereof, shall be deemed denied.

In this case, it is clear that the Commission did not grant that petition within 60 days of filing, or at any subsequent time. By operation of the cited statute, then, the petition must be deemed denied.

D. The Coalition's Affidavit and NSP's Response

The Coalition's affidavit (and NSP's objection thereto) relate to a dispute between the parties regarding the timeliness of the Environmental Coalition's petition for reconsideration for purposes of Minn. Stat. § 216B.27, subds. 1 and 2. In light of the denial of the Environmental Coalition's petition for reconsideration by operation of Minn. Stat. § 216B.27, subd. 4 (as explained above), the issue of the timeliness of the Environmental Coalition's petition for reconsideration becomes moot and not relevant to any issue currently before the Commission. Regardless of whether the petition is deemed filed on November 18 or 19, 1996, it is not contestable that more than 60 days have passed since the filing without a Commission decision

³ As noted by the Special Counsel, the luncheon was a social, impromptu affair; no one knew who all the attenders would be. The Commissioners paid for their own meals and except for the brief mention of the FERC report between two of the attenders, no NSP business was discussed, and the talk related generally to golf, relatives, and travel.

to grant the petition. In these circumstances, the Commission will not undertake to analyze and determine the dispute regarding the timeliness of the petition dispute at this time.

E. NSP's Compliance Filing

The Commission has reviewed the documentation filed by NSP on November 27, 1996 explaining how the Company's policies and programs apply to registered lobbyists and independent consultants. The Commission finds that the filing meets its expectations for such a filing, as required in the Commission's October 28, 1996 Order. Accordingly, the Commission will accept it.

F. No Prejudice to the Parties

Since no prohibited *ex parte* communication occurred and there is no objective basis for questioning the fairness and impartiality of Commissioners Jacobs and Johnson, it is clear that the parties to the merger proceedings and the proceedings themselves have not been prejudiced.

G. The Environmental Coalition Motion to Reopen the Record

Following extensive evidentiary hearings conducted by three ALJ s pursuant to the Commission's June 25, 1996 NOTICE AND ORDER FOR HEARING and ORDER ESTABLISHING PROCEDURAL FRAMEWORK, the record in this matter was closed.

On January 30, 1997, ALJ Allen Giles submitted his report on the Merger Savings and Rate Freeze issues. On February 19, 1997, ALJ Allan Klein submitted his report on Flow Control and Competitive Effects. On February 18, 1997, ALJ Richard Luis submitted his report on Pre-merger Revenue Requirements.

On March 12, 1997, the Environmental Coalition, the Energy Cents Coalition, and the Wisconsin Intervenors filed a motion to reopen the record.

On March 18, 1997, NSP filed a written response to the motion.

Following oral argument from the parties and Commission deliberations on April 4, 1997, the Commission issued its ORDER PROVIDING FOR PUBLIC HEARINGS AND ESTABLISHING A COMMENT PERIOD on April 18, 1997. In its Order, the Commission opened the record within a specific framework and timeline to receive written and oral comments from the public on all issues relevant to the merger.

The Commission has reviewed the motion filed March 12, 1997 by the Environmental Coalition, the Energy Cents Coalition, and the Wisconsin Intervenors and will deny it. The issues which the Commission wished further developed through evidentiary hearings have already been referred to the ALJ for such hearings in its June 25, 1996 ORDER ESTABLISHING PROCEDURAL FRAMEWORK and NOTICE AND ORDER FOR

HEARING.⁴

Further, the evidentiary hearings directed by the Commission in its June 25, 1996 ORDER ESTABLISHING PROCEDURAL FRAMEWORK have been held and the ALJs have submitted their reports.

In short, the Commission is not dissatisfied with the record that has been developed with respect to the issues which the Commission has previously and properly found should be developed through evidentiary hearings. No further evidentiary hearings are indicated.

The part of the record which the Commission found unsatisfactory was with respect to public input. However, the Commission finds that in its April 18, 1997 ORDER PROVIDING FOR PUBLIC HEARINGS AND ESTABLISHING A COMMENT PERIOD the Commission appropriately addressed the lack of public input. In its Order, the Commission directed:

A public hearing shall be held in late May and early June in each of the following cities regarding NSP's merger proposal at a time, date and place determined by the Administrative Law Judge after consultation with the Commission: Duluth, Fergus Falls, Mankato, Pipestone, and Winona. Two such public hearings shall also be held during this time period in the Twin Cities Metropolitan area.

Order at page 4.

Having taken appropriate action to ensure an adequate record to decide the merger issues before it in this docket, the Commission will deny the motion to reopen the record to conduct extensive further evidentiary hearings.

ORDER

1. The report submitted by the Commission's Special Counsel dated April 10, 1997 regarding a May 15, 1996 conversation which was alleged to have violated the Commission's *ex parte* rule, Minn. Rules, Part 7845.7200, subpart 1 is accepted and adopted.
2. The Commission's October 28, 1996 Order in this matter remains the Commission's disposition of the *ex parte* allegations.

⁴ To the extent that the parties' motion is in the nature of a request for reconsideration of these Orders, it is untimely per Minn. Stat. §§ 216B.27, subds. 1 and 2 and Minn. Rules, Part 7829.3000.

3. The petition for reconsideration of the Commission's October 28, 1996 Order in this matter filed by the Environmental Coalition, Energy CENTS Coalition and Citizens' Utility Board (EC/CUB) is deemed denied by operation of Minn. Stat. § 216B.27, subd. 4.
4. Northern States Power Company's compliance filing filed with the Commission November 27, 1996 in compliance with a directive in the Commission's October 28, 1996 Order is approved.
5. The voluntary recusals of Commissioners Jacobs and Johnson from any further proceedings in this docket are formally recognized.
6. The motion filed March 12, 1997 by the Environmental Coalition, the Energy Cents Coalition, and the Wisconsin Intervenors is denied.
7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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